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No. 83-804

IN THE

Supreme Court Of The United States

October Term, 1983

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, *et al.*,
Petitioners

v.

ISHMAEL JAFFREE, *et al.*,
Respondents

DOUGLAS T. SMITH, *et al.*,
Plaintiffs-Intervenor

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

RONNIE L. WILLIAMS
Counsel of Record

103 Dauphin Street
Suite 401
Mobile, Alabama 36602
(205) 432-6985

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STATEMENT

This is on a petition for certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit reversing the district court and holding certain state sponsored prayer exercises violative of the Establish-

ment Clause of the First Amendment to the U.S. Constitution.[1]

The controversy began at the start of the 1981-82 school year when Respondent Chioke Saleem Jaffree (then age 5) advised his teacher, Petitioner Charlene Boyd, that he did not want to participate in prayer exercises. Tr. at 111. Notwithstanding his protestations, Chioke was required to remain in the classroom during these afternoon exercises. Id. On March 5, 1982, Ms. Boyd was advised by Chioke's father, Respondent Ishmael Jaffree, during a parent-teacher conference, that he did not want his son exposed to religious exercises, and that in his opinion the exercises were unconstitutional. *Jaffree v. Board of School Commissioners*, 554 F.Supp. 1104, 1107 (S.D. Ala. 1983). Mr. Jaffree followed this conference with a handwritten letter to Ms. Boyd, dated March 11, 1982, again reminding her that leading her class in religious exercises was unlawful. Id.

Mr. Jaffree's other children, Makeba Green and Jamael Aakki Jaffree, made no formal objection to their teachers concerning their prayer practices. Tr. at 74 and 195. However, they did complain to their father, and on May 10, 1982, he sent a letter to school Superintendent Abe Hammons complaining about the prayer exercises being advanced in his children's schools. Despite Mr. Jaffree's protestations, the prayers continued.[2] *Jaffree v. Board of School Commissioners, supra* at 1107.

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[1]The religious exercise at issue were the daily recitation of the Lord's Prayer and the following three prayers:

(1) God is great, God is good, Let us thank Him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen.

(2) God is great, God is good, Let us thank Him for our food.

(3) For health and strength and daily food we praise Thy name, oh Lord.

Jaffree v. Wallace, 705 F.2d 1526, 1528 (11th Cir. 1983).

[2]The district court in its Findings of Fact found that after learning of Mr. Jaffree's concern over prayer exercises in their schools, petitioners

School attendance in Alabama is required by state law. Ala. Code Section 16-28-3 (1975).

On May 28, 1982, Mr. Jaffree, on behalf of three of his minor children, filed suit in the U.S. District Court seeking principally declaratory and injunctive relief against three teachers and various county school officials, who regularly sponsored or permitted the sponsoring of verbal classroom prayer. After learning that Bible reading over the school public address system and various other prayer practices were daily occurrences throughout the school system,[3] Mr. Jaffree amended his complaint to allege class claims.

On January 14, 1983, after a four day trial on the merits, the district court issued a Memorandum Opinion and Order dismissing this case for want of jurisdiction. R. at 443-512.[4]

After making an "independent review" of the relevant historical documents and reviewing the works of principally two historians, the district court concluded that "the

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Reed and Phillips consulted with the teachers involved but made no effort to instruct them to discontinue the practice. Id. at 1108.

[3]Though these facts were elicited from Mr. Jaffree on direct examination and would generally be regarded as hearsay, no objection was raised nor did petitioners offer rebuttal testimony. Tr. at 225. Additionally, Respondents offered to put on testimony supporting Mr. Jaffree's contentions but this testimony was objected to and sustained by the Court. Tr. at 167-70 and 287-90. The trial court denied Respondents' request to proffer, for appeal purposes, this testimony. Tr. at 169 and 290.

[4]At no time prior to, during or subsequent to the trial did the trial judge indicate an interest in reviewing the legislative history of the First and Fourteenth Amendment. In fact, the trial judge recognized in his August 9, 1982 Preliminary Injunction Order that it is settled law that the Establishment Clause reaches school prayer practices, and that the Fourteenth Amendment rendered the First Amendment applicable to the states. *Jaffree v. James*, 544 F.Supp. 727, 729 (S.D. Ala. 1982).

Considering how well settled the reach of the First Amendment and its applicability to the state via the Fourteenth Amendments, respondents felt no need, nor were they put on notice to introduce evidence on legislative intent.

United States Supreme Court has erred in its reading of history". Id. at 1128. In reversing a long line of this Court's precedents the district court stated:

> "This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate. . . .
>
> Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted." Id. at 1128.

The Eleventh Circuit Court of Appeals reversed the decision of the district court, found the prayer practices unconstitutional and remanded with instructions for the lower court to enter an appropriate order. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983).

Petitioners' Petition for Rehearing and Rehearing En Banc was denied. *Jaffree v. Wallace,* 713 F.2d 614 (11th Cir. 1983).

REASONS FOR DENYING THE WRIT

This case presents no substantial questions worthy of review. In the companion case of *Wallace v. Jaffree,* No. 83-812 (October Term, 1983), appellants assert:

> "This case would have merited a mere summary affirmance if the U.S. District Judge, Judge Brevard Hand, had not held a whole line of this Court's cases unconstitutional".[5]

[5]See Appellants' Jurisdictional Statement Brief at 5.

On the contrary, it is precisely because the district court overruled established precedent of this Court that the Court should not send the wrong signal by granting the Writ. Neither potential litigants nor lower courts should be encouraged to disregard this Court's reading of history and legislative intent interpreting our Constitution. There will always be legal scholars and historians who will disagree with this Court's interpretation of a constitutional provision. Certainty in the law compels that this Court, not a district court judge, be the ultimate authority on what our Constitution provides.

The Petitioners postulate two theories in support of their assertion that substantial questions are presented for review. First, petitioners claim that this Court's school prayer precedents do not control the teacher initiated prayers at issue in the present case. Second, this Court's Establishment Clause cases were founded upon an incorrect legal analysis of the Constitution, whereby this Court "assumed powers which were not given to it by the Constitution."[6] Both of Petitioners' arguments are so utterly lacking in merit as to warrant no further review.

ARGUMENT

A. Petitioners' First Question, Which is Premised on a Practice vs. Law Dichotomy, Raises no Issues Which Have Not Been Clearly Resolved by This Court.

Petitioners' first question for review is:

> Whether the Judgment of the United States Court of Appeals for the Eleventh Circuit, which overturned the judgment of the United States District Court for the Southern District of Alabama should be reversed

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[6]Petition For A Writ of Certiorari at 15.

and the judgment of the district court should be reinstated.

It is best to start with a statement of what this case is not about. This is not a case where an individual student or group of students absent state persuasion are attempting to offer prayers prior to mealtime.[7] Nor does this case involve prayers offered at a student assembly by student council members.[8] Nor is the use of school facilities before, during, or subsequent to the school day for religious purposes at issue here.[9] Neither does the case involve an opt-in classroom prayer priviso found unconstitutional in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), aff'd, 455 U.S. 913 (1982).

Petitioners argue that "this is an unusual case and none of the authorities cited by the Plaintiffs-Respondents address a fact situation at all similar to the present case."[10] This argument is premised on the assertion that "the religious activities in which the teachers and students were engaged were purely voluntary with no directives, for or against, from the State of Alabama or the Board of School Commissioners."[11]

Even if Petitioners' statement of the facts were correct[12] they would provide no defense to an Establishment Clause

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[7]*Stein v. Oshinsky*, 348 F.2d 999 (2nd Cir. 1968) *cert. denied* 382 U.S. 957.

[8]*Collins v. Chandler Unified School Dist.*, 644 F.2d 759 (9th Cir. 1981), *cert. denied*, 454 U.S. 863.

[9]*Lubbock v. Lubbock*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 800 (1983).

[10]Petition for a Writ of Certiorari at 14.

[11]Id. at 14-15.

[12]None of the teachers advised parents about the prayer exercises, nor informed them that their children could be removed from the classroom. See Green, Boyd and Pixie Alexander's Depos. at 32, 29, and 23, respectively. In fact, Ms. Boyd, with knowledge of Chioke's protestations, failed to remove him from the class during these exercises. See page 1 of this Brief.

violation. Petitioners' reading of the scope of this Court's opinion in *School District of Abington Township, Pa. v. Schempp,* 374 U.S. 203 (1963) is far too limited. In *Schempp,* this Court held both the *practices* at issue, and the *laws* requiring them, were unconstitutional. 374 U.S. at 205. The *Schempp* case was consolidated with *Murray v. Curlett,* 374 U.S. 203 (1963), and both were decided together. The *Murray* case involved no state statute or mandated school board policy. The petitioners in *Murray* were challenging the *practice* of daily Bible reading and the recitation of the Lord's Prayer—morning exercises intended to advance the Christian religion.[13]

Judge Hatchett, speaking for the majority in *Jaffree v. Wallace, supra,* recognized the fallacy of Petitioners' practice vs. law argument. "If a statute authorizing the teachers' activities would be unconstitutional, then the activities, in the absence of a statute, are also unconstitutional." Id. at 1534. This reasoning is in line with Justice Douglas' concurrence in *Schempp, supra,* where he admonished that what may not be done directly may not be done indirectly less the Establishment Clause becomes a mockery. 374 U.S. at 230.

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[13]Petitioners are patently wrong in asserting: "In all of the plaintiffs' cited cases the court was presented with religious activity generated by state enactments." Petition for a Writ of Certiorari at 15. Jaffree's brief before the Eleventh Circuit cited the following cases which involved no state enactment. *Despain v. Dekalb County Community School Dist.,* 384 F.2d 836 (7th Cir. 1967), (at issue were the teachers' use of a grace with the word "God" removed); *Hall v. Bd. of School Com'rs of Conecuh County,* 656 F.2d 999 (5th Cir. 1981), (case involving Bible reading over the school public address system); *Collins v. Chandler Unified School Dist.,* 644 F.2d 759 (9th Cir. 1981) *cert. denied,* 454 U.S. 863, (case involved prayers initiated by student council members); *Metzer v. Bd. of Public Instruction of Orange Cty.,* 548 F.2d 559 (5th Cir. 1977), *cert. denied,* 439 U.S. 552, (at issue was the distribution of Giddeon Bibles on school premises), and *Stein v. Oshinsky,* 348 F.2d 999 (2nd Cir. 1968) *cert. denied,* 382 U.S. 957, (student group here attempted to offer the identical grace at issue presently, but were denied by school authorities).

The teachers' acts are state action. Teachers are state employees. "Under Alabama law, teachers are appointed, suspended, and removed by the county school boards. See Ala. Code Section 16-8-23 (1927). The Alabama county school boards are creatures of the state and are controlled by the state. See Ala. Code Section 16-3-11 (1927); Ala. Code Section 16-8-8 (1927); (further citations omitted)." *Jaffree v. Wallace, supra* at 1533.

The board here ratified the teachers' prayer practices. Id. at 1534. Mr. Jaffree made several contacts with the school superintendent and complained about the teacher activities.[14] Additionally, on July 28, 1982, the Board adopted a resolution supporting the teacher prayer exercises.[15] On this record the Petitioners cannot be serious in asserting no state involvement.

Without resort to the tri-parte test articulated in *Lemon v. Kurtzman,* 403 U.S. 602 (1971)[16] the state sponsored

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[14]Tr. at 215-217.

[15]See Brief of Appellant before the Eleventh Circuit at 27 Note 16. During this meeting Petitioner Dan Alexander, in addressing the Board, made the following statement:

> (1) The Board must say the teachers are wrong; get out of this situation in the easiest way possible, and issue directives it shall never be done again; or
>
> (2) The Board must take the position the teachers were not wrong; the Board will support the teachers, will not put out any directives stopping prayer in the schools in the future, and the Board will also challenge the matter in court at whatever levels necessary.
>
> Id. at 5.

[16]The *Lemon* standard, as modified by the Eleventh Circuit in *American v. Rabun County Chamber of Commerce,* 678 F.2d 1379 (11th Cir. 1982), requires challenged acts of state officials to meet each of three criteria to satisfy the strictures of the Establishment Clause:

> (1) The *action* must have a secular purpose;
>
> (2) The principal or primary effect of the *action* must neither advance nor inhibit religion; and
>
> (3) The challenged *act* must not foster an excessive government entanglement with religion.
>
> 678 F.2d at 1389.

exercises at issue here would still fail to satisfy the strictures of the Establishment Clause. Having children bow their heads and recite the Lord's Prayer is unquestionably a religious exercise. *Murray, supra.* The other prayer exercises fair no better. Each are designed to give thanks to a celestial being for food. It cannot be gainsaid that these practices do not give preference to and advance theism over non-theism, thereby breaching the duty of strict neutrality. The Eleventh Circuit has recognized that "prayer is perhaps the quintessential religious practice". *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981) aff'd. 455 U.S. 913 (1982). By permitting prayer the state does not act neutral, it only furthers the interest of those religions that can benefit from its largess—ones willing to avow a belief in the existence of God, and use prayer as a means to that end. Even the district court acknowledged that had precedent been followed, the prayer exercises at issue here would be unconstitutional:

> (I)n this circuit, prayer in public schools is per se unconstitutional. . . . In sum, under present rulings the use of officially authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause.
>
> *Jaffree v. Board of School Commissioners, supra* at 1112.

When applied, the prayer practices at issue here fails each part of the *Lemon* standard. That the purpose of these exercises was to instill in the children a belief in God is not in dispute.[17] Petitioners admit that the purpose of

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[17]During the trial, Petitioner Green was asked:

Q What was the purpose in saying this grace?

A The purpose is to instill something within the children.

Q What is that something?

A To be thankful.

these exercises were to advance religious beliefs.[18] Nor is it difficult to discern that the "principal or primary effect" has been to advance religion:[19]

> Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied. The primary effect of prayer is the advancement of ones religious beliefs. It acknowledges the existence of a Supreme Being. The involvement of the Mobile County school system in such activity involves the state in advancing the affairs of religion.
>
> *Jaffree v. Wallace,* 705 F.2d, 1534-35.

There can be little doubt that excessive entanglement is present here. An entanglement inquiry focus on the degree and quality of governmental interaction with religion. *Committee for Public Education v. Nyquist,* 413 U.S. 756, 794-97 (1973), *Lemon v. Kurtzman,* 403 U.S. 602, 615 (1971). This Court has recognized two types of entanglement. The first is administrative entanglement where governmental officials enter into close ongoing contact with the affairs of religious institutions. *Lemon, supra* at 615-20, *Meek v. Pittinger,* 421 U.S. 369. The second type of en-

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Q Thankful to who?

A Thankful to God.

Tr. at 179.

Other Petitioners expressed similar sectarian purposes for their religious exercises. See Tr. at 68, 70, 109-10, 133.

[18]See Petition for a Writ of Certiorari at 8.

[19]The direct effect of these exercises on the children is evident in Petitioner Boyd's testimony:

Q Did you continue to recite the graces throughout the school year?

A Yes.

Q How often was it recited?

A Before we went to lunch.

Q Everyday before going to lunch?

A Yes. Even if we forgot, somebody stopped and we had to say it.

Tr. at 111; See also Green's testimony. Tr. at 180; and Pixie Alexander's testimony. Tr. at 92.

tanglement focus on the potential for political divisiveness. *Lemon, supra* at 623.

The latter recognize that competition among religious sects for political and religious supremacy will occasion civil strife generated by competing efforts to gain or maintain support from the government. *Nyquist, supra,* at 796.

Respondents concede that there is little danger that the state sponsored prayer exercises at issue here will foster entanglement of the administrative type. However, the potential for political divisiveness is clear and present.

Petitioners have controlled the time, manner and types of prayers[20] which may be offered. The prayers are offered during the school day and on school facilities and at the suggestion of school officials. This alone is enough to establish excessive entanglement, but here, there is more. The filing of this lawsuit has resulted in the very civil strife that the Establishment Clause was designed to avoid. Mr. Jaffree and his counsel have been the targets of numerous threatening phone calls and letters. There was a flood of letters to the editor of the local daily criticizing Mr. Jaffree for bringing this suit. More than six hundred people joined as intervenors, in support of the school officials, asserting that their free exercise rights require state sponsored prayer in public schools.[21]

Further, the need to monitor individual teacher prayer practices gives rise to the very concerns expressed by this Court:

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[20]When viewed as showing preference to the Christian faith the teacher prayer exercises still fail to satisfy the requirements of the Establishment Clause because they are not justified by a compelling governmental interest, nor, is it shown that such exercises are "closely fitted to further that interest", (citation omitted). *Larson v. Valente,* U.S. , 102 S.Ct. 1673 (1982).

This interest is not satisfied by asserting the teachers' free exercise rights. The state is not required, in this instance, to provide a forum for the teachers to exercise their religion. See discussion on page 12 infra.

[21]R. at 252-57 and 424.

> (T)he very restrictions and surveillance necessary to ensure that teachers play a strictly non ideological role give rise to entanglements between church and state. *Lemon, supra,* at 620-21.

Petitioners argue "To deny a teacher the opportunity to voluntarily pray before going to lunch whether it be silent or verbal prayer is violating his or her constitutional rights under the free exercise clause."[22] This argument is disingenuous. Self initiated silent prayer can never be "silenced". While it is a closer question whether the "Free Exercise Clause" compells that a teacher be allowed to utter audible prayers in front of her class, there is no question that the Clause does not permit a teacher to lead her class in the chanting of these prayers.

> . . . A school is obligated to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion. See L. Tribe Constitutional Law Section 14-8 (1978). See also *Abington School v. Schempp,* 347 U.S. at 223, 83 S.Ct. at 1572; *Brandon v. Board of Education of Guilderland Central School District,* 635 F.2d at 977. Here, there is no problem with students being foreclosed from practicing religion. The students attended school only several hours a day, five days a week, nine months during the year. The other hours are effectively open for their attendance at religious activities at places other than state supported schools.
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> *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.,* 669 F.2d 1038, 1048.

B. Petitioners' Second, Third and Fourth Questions Have Been Exhaustively Resolved by this Court.

Petitioners' second question for review is:

> Whether events prior to the adoption of the first amendment prove that it does not prohibit the defend-

[22]Petition for a Writ of Certiorari at 16.

ant school teachers from permitting voluntary prayer in the classroom.

Petitioners' third question for review is:

> Whether the fourteenth amendment incorporates the Establishment Clause of the first amendment against the state thereby prohibiting the defendant teachers from permitting voluntary prayer in the classroom.

Petitioners' fourth question for review is:

> Whether voluntary prayer in the classroom violates the Establishment Clause.

Respondents will discuss each of these arguments in tandem. This Court has considered and rejected Petitioners' argument concerning the scope of the Establishment Clause and its applicability to the state numerous times.[23] There is nothing new to review. Repetitive litigation serves neither the Court nor the public well.

The Eleventh Circuit discussed the two views concerning the interpretation of the Establishment Clause. The narrow view, argued by Petitioners, that the Clause only prevents the establishment of a national church and only applies to Congress. The broader view interprets the Clause as prohibiting any governmental support of religion by either the state or the several states. *Jaffree v. Wallace*, 705 F.2d 1530. The Circuit Court, unlike the District Court, followed this Court's broad interpretation of the Clause:

> (T)his Court has given the amendment a 'broad interpretation . . . in light of its history and the evils it was designed forever to suppress', *McGowan*, 366 U.S. at 441-42, 81 S.Ct. at 1113. . . . In *Engel v. Vitale*, the court meticulously re-examined the history surround-

[23] See *Everson v. Board of Education*, 330 U.S. 1 (1947); *McCollum v. Board of Education*, 333 U.S. 203 (1948); *McGowan v. Maryland*, 366 U.S. 420 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and, *Engel v. Vitale*, 370 U.S. 421 (1962).

ing the first and fourteenth amendments and reaffirmed its view.

Id. at 1531-32.

Finally, we come to the voluntariness of Petitioners' prayer practices. Nothing in the record indicates that these practices were voluntary. They were initiated by the teachers as part of their daily routine.[24] No parents' permission was solicited neither were parents informed of the existence of these practices.[25] Further, when informed of Respondents' objection, no steps were taken to excuse them from these exercises.[26] On this record these practices can hardly be considered voluntary.

Indeed, the Establishment Clause would lose all meaning if the state could set up a church or place of worship merely by asserting that membership is voluntary. For Establishment Clause purposes, the fact that participation in a religious program sponsored by the state is voluntary is irrelevant. Participation in the prayer programs reviewed by this Court in *Engel v. Vitale, supra, School District of Abington Township v. Schempp, supra, Chamberlain v. Dade County Board of Public Instruction,* 377 U.S. 402 (1964) and *Karen B. v. Treen, supra,* was also "voluntary" in the sense that students were not officially required to participate.

CONCLUSION

The issues presented in this petition are so utterly lacking in merit as to not justify any further extension of this Court's time. Accordingly, Respondents respectfully submit that the petition is due to be denied.

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[24]Tr. at 66, 108 and 179.
[25]Tr. at 66 and 67.
[26]Tr. at 116.

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V.	•	NO. 83-804
ISHMAEL JAFFREE, et al., Respondents.	•	

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by mail this 21st day of February, 1984 to:

ROBERT C. CAMPBELL, III, ESQ.
ROBERT H. MUDD, JR., ESQ.
SINTZ, PIKE, CAMPBELL & DUKE
3763 PROFESSIONAL PARKWAY
MOBILE, ALABAMA 36609

THOMAS O. KOTOUC, ESQ.
THOMAS F. PARKER, IV, ESQ.
PARKER & KOTOUC
317 NORTH HULL STREET
MONTGOMERY, ALABAMA 36104

Attorney for Respondents